STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 3, 2007
v	No. 262858 St. Joseph Circuit Court
LISA ANN DOLPH-HOSTETTER, Defendant-Appellant.	LC No. 00-010340-FC

Before: O'Connell, P.J., and White and Markey, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I join in the majority opinion except regarding the admission at trial of Rosalie Bowersox's testimony at a medical examiner's inquest. I conclude that this prior testimony was improperly admitted and affected the outcome of the trial.

I do not agree that Bowersox's testimony at the medical examiner's inquest was admissible at defendant's trial under MRE 801(d)(1)(A).[1] Bowersox testified at trial that she could not remember testifying at the medical examiner's inquest, could not remember her testimony at the inquest, and could not remember the events about which she testified at the inquest. Bowersox testified at trial that she had suffered three strokes since the inquest. The prosecution concedes that Bowersox truly had no recall of her testimony or the events at issue.

I acknowledge that the majority rule is that "the validity of cross-examination at trial is not undermined when the declarant testifying at trial asserts no memory of the events reported in the earlier statement." Weinstein's Federal Evidence, § 801.20[2], p 801-29, citing *United States v Owens*, 484 US 554, 561-564; 108 S Ct 838; 98 L Ed 2d 951 (1988), holding that "failure of

[1] Because the prosecution did not argue below, and does not argue on appeal, that Rosalie Bowersox's testimony at the medical examiner's inquest in 1996 was admissible at trial under MRE 801(d)(1)(A), I would not affirm on that basis.

The prosecution argued below that Bowersox's inquest testimony was admissible as former testimony of an unavailable witness under MRE 804(b)(1). On appeal, the prosecution argues for the first time that Bowersox's inquest testimony was additionally admissible under MRE 803(5) as prior recollection recorded, under the residual hearsay exceptions, MRE 803(24) and 804(7), and under MCL 768.26.

cross-examination is 'not produced by the witness' assertion of memory loss'; approving admission under Rule 801(d)(1)(C) of prior statement by victim naming defendant as assailant even though victim at trial court not remember seeing assailant."

Nevertheless, as recognized by McCormick:

> When is a prior statement inconsistent? *Where a witness no longer remembers an event, a prior statement describing that event should not be considered inconsistent.* Yet the tendency of unwilling or untruthful witnesses to seek refuge in a claim of forgetfulness is well recognized. Hence the judge may be warranted in concluding under the circumstances the claimed lack of memory of the event is untrue and in effect an implied denial of the prior statement, thus qualifying it as inconsistent. The case law readily accepts this position.

[McCormick On Evidence, (6th ed, 2006), § 251, p 151. Emphasis added]

Noteworthy is that very few cases which involve FRE 801(d)(1), whether decided before or after *Owens, supra,* posed the rare situation this case poses-- a declarant claims a lack of memory or amnesia and it is not feigned, and the declarant does not remember the fact that she gave prior testimony, nor does she remember the substance of the prior testimony. In several of these rare cases, courts have noted that the testimony would not be properly admissible under FRE 801(d)(1).[2] See e.g., *United States v Palumbo,* 639 F2d 123, 128 n 6 (CA 3, 1981) (noting that "lack of memory as to the substance of a prior statement may not be inconsistent in certain circumstances with the prior statement," [citations omitted] and that "[i]t would seem that the prior statement should not be included under 801(d)(1)(a) if the judge finds that the witness genuinely cannot remember, and the period of amnesia or forgetfulness is crucial as regards the facts in issue," quoting 4 Weinstein's Evidence, § 801(d)(1)(A)(04), 801-98). See also *United States v DiCaro,* 772 F2d 1314, 1323 (CA 7, 1985) (noting that "in many or perhaps most cases in which the witness suffers a total memory lapse concerning both the prior statement and its contents, the witness cannot be considered subject to cross-examination concerning the statement under [Rule 801(d)(1)(A)]," citing 4 Weinstein's Evidence ¶ 801(d)(1)(A)[07], at 801-132).

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[2] FRE 801(d) and MRE 801(d) provide:

> (d) **Statements which are not hearsay**. A statement is not hearsay if—
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> > (1) **Prior statement of** [MRE] / **by** [FRE] **witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is
> >
> > > (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition

Nor was Bowersox's inquest testimony admissible as former testimony of an unavailable witness, under MRE 804(b)(1).[3] At the medical examiner's inquest held in October 1996, there were no named defendants. One attorney was appointed to represent all unnamed and potential defendants at the inquest. The inquest transcript is not before us, but the portions of Bowersox's testimony at the inquest read into the record at trial contain no cross-examination, and there is no indication from the parties' arguments that Bowersox was cross-examined at all at the inquest. Although as the majority notes, cases hold that it is the opportunity for cross-examination that counts, it simply cannot be said in this case that such an opportunity existed, where defendant was not yet a defendant, had not even met the attorney representing all potential and future defendants, and no cross-examination was conducted. Under these circumstances, defendant did not have "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination," as required under MRE 804(b)(1).[4] See *People v De Witt*, 233 Mich 222, 226; 206 NW 562 (1925); *People v Farquharson*, __ Mich App __ ; __ NW2d __ (2007) [Docket No. 271783, issued 2/13/07].

Nor was Bowersox's testimony admissible under the catchall hearsay exception, or MCL 768.26. These provisions cannot override the Confrontation Clause's requirement that testimony be subject to cross-examination. The majority's reliance on *People v Chavies*, 234 Mich App 274; 593 NW2d 655 (1999), overruled in part on other grounds *People v Cleveland Williams*, 475 Mich 245; 716 NW2d 208 (2006), is misplaced. A witness who has no mental capacity to recall either her prior testimony, or the subject matter of that testimony, is simply not available for cross-examination at trial. See discussion *supra*. Additionally, Bowersox's testimony was not admissible as prior recollection recorded, as the requirements of that exception were not established by her testimony.

Further, the error in the admission of this testimony was not harmless. Bowersox's prior untested testimony was the linchpin of the prosecution's case at trial, and it is probable that its admission affected the outcome of defendant's trial. The prosecution's reliance on Bowersox's

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[3] MRE 804(b)(1) provides:

> (b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> (1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

MRE 804(a) includes in its definition of "unavailability as a witness" the situation in which the declarant "has a lack of memory of the subject matter of the declarant's statement . . ." MRE 804(a)(3).

[4] Further, I fail to see the merit in the prosecution's bald assertion that the attorney appointed to represent all unnamed and potential defendants at the inquest was defendant's "predecessor in interest" in a "prior civil or action or proceeding."

inquest testimony cannot be overstated—it was central to the prosecution's case. As defendant argued in her motion for new trial, the prosecution in opening statement, closing argument, and in rebuttal repeatedly highlighted the importance of Bowersox's inquest testimony, especially Bowersox's testimony that she (Bowersox) told defendant, when defendant knocked on her door early in the morning of the day of the murder, that Gary and Carol had changed their phone number because of threatening calls; that she, Bowersox, would not give the phone number to defendant; that Carol Knepp's work hours had changed to third-shift, and that although she wasn't sure of the exact time Carol Knepp would be leaving for work, she imagined it would be around 8 or 8:30 p.m. The prosecutor referred to Bowersox in closing argument as "a critical witness." Further, the prosecution's emphasis on Bowersox's testimony was not lost on the jury; during deliberations the jury sent out two notes. The first note said:

> "Legal definition of opportunity."

The judge sent a typed note back to the jury, stating:

> "I have received your note regarding the definition of 'opportunity'.
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> 'Opportunity' was not a word I used in my instructions. Can you be more specific about your concern or question? Is there a specific issue or instruction you would like me to clarify?"

The jury sent back a handwritten note stating:

> The prosecutor discussed that the defendant had the "opportunity" aka the time that the murder would have to take place, as CK was leaving for work. *We have been discussing the possibility that the defendant knew the time that the crime should take place.* Is this "opportunity"? [Emphasis added.]

The court sent back a typewritten note after meeting with counsel, stating:

> I have received your follow up note regarding the definition of "opportunity".
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> Opportunity is not a specific element either [sic] offense. Please see the instructions.
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> Knowing the time of the offense, in and of itself does not establish "aiding and abetting but may be evidence of her involvement. See instructions 8.1, 8.3, 8.4 and 8.5
>
> Knowing the time of the offense, in and of itself, does not establish that the defendant was part of a conspiracy but may be evidence of her involvement. See 10.2 and 10.3.

Because there is a high probability that the outcome of the trial was affected by the admission of Bowersox's inquest testimony, I would reverse and remand for a new trial on the second-degree murder charge.

/s/ Helene N. White